Supreme Court, U.S.
FILED
AUG 31 2001
CLERK

(3)

No. 00-1860

IN THE

Supreme Court of the United States

MEMORIAL HOSPITALS ASSOCIATION,
Petitioner,

v.

CAROLYN HUMPHREY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

F. CURT KIRSCHNER
DIPANWITA DEB AMAR
O'MELVENY & MYERS LLP
275 Battery Street
San Francisco, CA 94111
(415) 984-8700

WALTER DELLINGER
(Counsel of Record)
SRI SRINIVASAN*
ERIKA FRICK*
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300
** Admitted in California only*

Attorneys for Petitioner

14 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER.....1

I. THERE IS A CIRCUIT CONFLICT ON WHETHER AN EMPLOYEE WHO REJECTS AN ACCOMMODATION CAN BASE AN ADA CLAIM ON THE EMPLOYER'S FAILURE TO REITERATE ITS OFFER OF THE SAME ACCOMMODATION... 2

II. THE CIRCUITS DISAGREE ABOUT THE STANDARDS FOR DETERMINING WHEN A LEAVE OF ABSENCE CONSTITUTES A REASONABLE ACCOMMODATION.. 8

TABLE OF AUTHORITIES

Page(s)

CASES

Duckett v. Dunlop Tire Corp.,
120 F.3d 1222 (11th Cir. 1997).....8

Hankins v. The Gap, Inc.,
84 F.3d 797 (6th Cir. 1996).....*passim*

Hudson v. LCI Telecomms. Corp.,
87 F.3d 1167 (10th Cir. 1996).....8

Jackan v. New York State Dep't of Labor,
201 F.3d 562, 566 (2d Cir. 2000).....7

Mole v. Buckhorn Rubber Products, Inc.,
165 F.3d 1212 (8th Cir. 1999).....4

Myers v. Hose, 50 F.3d 278 (4th Cir. 1995).....8

Rehling v. City of Chicago,
207 F.3d 1009, 1016 (7th Cir. 2000).....7

Willis v. Conopco,
108 F.3d 282, 285 (11th Cir. 1997).....7

STATUTES

42 U.S.C. § 12112(b)(5)(A).....2, 10

REPLY BRIEF FOR PETITIONER

MHA's petition presents two important questions concerning an employer's duty under the ADA to make reasonable accommodations to an employee's disability. The first question is whether an employer's failure to offer a particular accommodation before terminating an employee can be found to violate the statutory obligation to make reasonable accommodations even if the employer had already offered that exact accommodation to the employee and the employee had rejected it. The second question is whether a leave of absence can be found to constitute a "reasonable" accommodation notwithstanding plaintiff's failure to make any showing concerning either the length of leave necessary to address the disability or whether a leave (of any duration) would be likely to address the disability. The Ninth Circuit below, in disagreement with the decisions of other courts of appeals, answered yes to both questions.

Respondent's principal argument against granting the petition is that neither of those questions in fact is raised by the opinion below, and that the decision instead was about a breakdown of the so-called "interactive process" contemplated by the ADA. That is incorrect. The Ninth Circuit indisputably held that MHA violated its duty to make reasonable accommodations by failing to offer a leave of absence before terminating respondent, even though respondent (according to the Ninth Circuit's explicit assumption) already had rejected that exact accommodation when previously offered it by MHA. The Ninth Circuit likewise undeniably found that a leave of absence constitutes a reasonable accommodation in this case without requiring any demonstration whatsoever by respondent as to the length of leave necessary to address her disability or as to whether a leave of any duration would likely have addressed her disability.

The "interactive process" discussion in the opinion below, contrary to respondent's submission, in no way shows

that the decision fails to raise the two questions presented in the petition. Instead, the "interactive process" discussion informs the court's *answer* to the first question presented, and it is entirely irrelevant to the court's analysis of the second question. When addressing the first question, the Ninth Circuit relied on the "interactive process" to conclude that an employer has a "continuing duty to offer a reasonable accommodation," Pet. App. 22a, even if that accommodation was already offered and rejected. The opinion makes no mention of the "interactive process" when addressing the second question presented, because whether a leave of absence is a reasonable accommodation is a separate question from whether MHA can be held liable for failing to reiterate its offer of that accommodation. The opinion below raises both questions presented in the petition, in short, and the "interactive process" discussion does not suggest otherwise.

I. THERE IS A CIRCUIT CONFLICT ON WHETHER AN EMPLOYEE WHO REJECTS AN ACCOMMODATION CAN BASE AN ADA CLAIM ON THE EMPLOYER'S FAILURE TO REITERATE ITS OFFER OF THE SAME ACCOMMODATION.

1. Because the Brief in Opposition wholly misconceives the basis of the opinion below, it is necessary at the outset briefly to reiterate and clarify the Ninth Circuit's rationale. The ADA prohibits an employer from "not making reasonable accommodations" to the limitations of a disabled employee. 42 U.S.C. § 12112(b)(5)(A). The only potential accommodation at issue in this case is a leave of absence.[1] The district court held that MHA's failure to offer a leave of absence before terminating respondent could not form the basis

[1] The opinion contains some discussion of another conceivable accommodation – *i.e.*, allowing respondent to work at home – but the Ninth Circuit specifically did "not reach this issue because on appeal Humphrey argues only the failure to grant a leave of absence as a violation of the duty to accommodate." Pet. App. 21a n.16.

of an ADA reasonable accommodation claim, finding it "dispositive . . . that [respondent] was initially offered a leave of absence and rejected it, and then failed to request a leave of absence subsequently" prior to her termination. Pet. App. 45a.

The principal issue before the Ninth Circuit thus was whether MHA could be liable for failing to offer a leave of absence before terminating respondent, notwithstanding that she had previously been offered a leave, had rejected it, and had failed subsequently to request a leave or otherwise to apprise MHA before her termination that she was interested in a leave. That is precisely how the opinion below frames the question. *See* Pet. App. 18a ("The remaining question with respect to the duty to accommodate is a purely legal one: was MHA obligated to suggest a leave of absence or to explore other alternatives . . . or was it Humphrey's burden to make an express request for a leave of absence before she was terminated?"). The Ninth Circuit rejected MHA's contention that respondent's failure to ask for a leave of absence before her termination precluded her from prevailing in her claim, concluding that "a leave of absence was a reasonable accommodation for Humphrey's disability" and that "MHA was under a continuing duty to offer a reasonable accommodation." Pet. App. 21a-22a. MHA's "continuing duty to offer a reasonable obligation" thus required it to reiterate its offer of a leave before terminating respondent, even though she had rejected MHA's previous offer of a leave.

That conclusion cannot be reconciled with the holding of the Sixth Circuit in precisely analogous circumstances in *Hankins v. The Gap, Inc.*, 84 F.3d 797 (6th Cir. 1996). Just as respondent in this case had been made aware by MHA that she could take a leave of absence but had rejected the offer of a leave, the employee in *Hankins* was made "clearly aware" of the availability of a leave of absence but had "refus[ed] to accept [the] available reasonable accommoda-

tions." *Id.* at 801, 802. Contrary to the Ninth Circuit's conclusion in this case, the Sixth Circuit in *Hankins* rejected the employee's claim that her employer should have reiterated the availability of a leave of absence before terminating her. According to the Sixth Circuit, "an employer has no duty to reiterate self-evident options to an employee when she is clearly already aware of them." *Id.* at 801. The common sense basis of that holding, as the Eighth Circuit explained in *Mole v. Buckhorn Rubber Products, Inc.*, 165 F.3d 1212 (8th Cir. 1999), is that an employee cannot "expect the employer to read her mind and know she secretly wanted a particular accommodation and then sue the employer for not providing it." *Id.* at 1218 (internal quotation marks omitted). That, however, is precisely what is allowed by the Ninth Circuit's opinion below.

2. Respondent does not suggest that the circumstances in *Hankins* were materially different than those in this case. She instead offers two separate grounds for denying review of the Ninth Circuit's determination that MHA was required to reiterate its offer of a leave of absence before terminating her employment. Both suggested grounds are without merit.

First, respondent submits, the issue of whether MHA was obligated to reiterate its offer of a leave of absence implicates an unresolved "factual dispute," *i.e.*, whether respondent in fact had been offered and had rejected a leave of absence at her June 7 meeting with MHA representatives. Brief in Opposition ("Opp.") at 10. That assertion is flatly incorrect. The district court found that respondent could "raise no genuine issue of material fact as to whether Defendant offered [her] a leave of absence," explaining that respondent's "own deposition testimony makes it clear that Defendant did." Pet. App. 42a; *see also* Pet. App. 45a (discussing "the facts that Plaintiff was initially offered a leave of absence and rejected it"). And the Ninth Circuit did not second-guess that factual determination. To the contrary, the

court deemed that factual issue "not material" to its reasoning, Pet. App. 4a, and *explicitly assumed* in its analysis that the district court's finding was correct, *see* Pet. App. 20a ("assum[ing] that Humphrey turned down the leave of absence in June"). As a result, the court below held that MHA was under a continuing obligation to offer a leave of absence to respondent *regardless* of the assumption that MHA had previously offered, and she had rejected, that very same accommodation.

Respondent's remaining argument against review of the first question presented is equally unpersuasive. Respondent contends that the "the Ninth Circuit decision is not about . . . the failure of an employer to offer an accommodation already offered and rejected," but instead is about "the breakdown of the ADA-mandated interactive process," Opp. 5, and that the opinion below therefore fails to raise the first question presented in the petition. As a result, respondent submits, the opinion below does not address the same question addressed by the Sixth Circuit in *Hankins*. *See* Opp. 10.

Respondent's reasoning confuses the question addressed by the opinion below with the court's *answer* to that question. In a separate section of the opinion entitled "BREAKDOWN OF THE INTERACTIVE PROCESS," the court addressed whether MHA was "obligated to suggest a leave of absence" before terminating respondent, or instead whether – as the district court had found – it was "Humphrey's burden to make an express request for a leave of absence before she was terminated" given that she had already rejected MHA's initial offer of a leave of absence. Pet. App. 18a. The court's discussion of the "interactive process" thus is nothing more than a framework for answering whether MHA was required to reiterate its offer of a leave of absence before terminating respondent, *i.e.*, the first question presented by the petition. It follows that the question *is* raised by the opinion below. The Ninth Circuit answered that question by

concluding that the "interactive process" imposes upon an employer a "continuing duty to offer a reasonable accommodation." Pet. App. 22a. The Sixth Circuit's contrary answer renders the question ripe for this Court's review.

In contending otherwise, respondent appears to assume that the ADA imposes a freestanding requirement upon employers to engage in an "interactive process," and that the Ninth Circuit found a violation of the ADA based solely on a breakdown of the "interactive process." That understanding is incorrect. The "interactive process" concept has been treated by courts, including by the Ninth Circuit below, as a means of apportioning responsibility for a failure to make a reasonable accommodation *where a reasonable accommodation was available but not made*. *See* Pet. App. 21a ("Given MHA's failure to engage in the interactive process, liability is appropriate *if* a reasonable accommodation without undue hardship to the employer would otherwise have been possible.") (emphasis added). A breakdown of the "interactive process" thus does not *itself* violate the ADA: that can only occur where there has been a failure to make a reasonable accommodation. But where there has in fact been a failure to make a reasonable accommodation, an analysis of the "interactive process" can help determine whether the employer or employee should be held responsible for the failure, and thus whether the employee can assert an ADA claim.

Properly conceived, then, the "interactive process" is simply a means of answering the ultimate question in every ADA reasonable accommodation case, *viz.*, whether the employer can be held liable for failing to provide a reasonable accommodation. For instance, the district court in this case found that "it must place the blame for the breakdown in the interactive process with Plaintiff," given that "Plaintiff was initially offered a leave of absence and rejected it, and then failed to request a leave of absence subsequently" prior to her termination. Pet App. 45a. In those circumstances, the

district court reasoned, MHA could not be found liable for failing to provide a leave of absence as an accommodation. *Id.* The Sixth Circuit reached the same conclusion in *Hankins*, ruling that an employer cannot be held liable for failing to offer an accommodation of which an employee has been made aware but has chosen not to accept. The Sixth Circuit thus places responsibility on the employ*ee* in those circumstances for the failure to provide a reasonable accommodation. The Ninth Circuit below, by contrast, imposed a "continuing duty" on the employ*er* "to offer a reasonable accommodation." Pet. App. 22a.

Finally, even if respondent were correct that the Ninth Circuit found a violation of the ADA based exclusively on the "interactive process" – *i.e.*, independently of whether there was an available reasonable accommodation that the employer failed to provide – that would only support the grant of certiorari. No other circuit has held that a failure to engage in the interactive process itself violates the ADA. Every court of appeals to have addressed the question, in fact, has decided to the contrary. *See, e.g., Rehling v. City of Chicago*, 207 F.3d 1009, 1016 (7th Cir. 2000); *Jackan v. New York State Dep't of Labor*, 201 F.3d 562, 566 (2d Cir. 2000); *Willis v. Conopco*, 108 F.3d 282, 285 (11th Cir. 1997). Respondent's apparent understanding of the Ninth Circuit's decision below thus would place that court in conflict with a number of other courts of appeals.[2]

---

[2] In *US Airways, Inc. v. Barnett*, No. 00-1250, the Court granted certiorari as to one question in the petition but declined to grant review of a separate question concerning the proper role of the "interactive process" in the resolution of an ADA reasonable accommodation claim. As we have explained here and as the petition and reply brief in support of the petition in *Barnett* also observe, no court has held that a failure of the "interactive process" can independently violate the ADA. But, as the petition in *Barnett* explains further, the courts of appeals appear to have adopted varying views of the role of the "interactive process" in resolving an ADA reasonable accommodation claim, and the approach of a

II. THE CIRCUITS DISAGREE ABOUT THE STANDARDS FOR DETERMINING WHEN A LEAVE OF ABSENCE CONSTITUTES A REASONABLE ACCOMMODATION.

The Ninth Circuit's holding that a plaintiff need only "satisfy the minimal requirement that a leave of absence could plausibly have enabled [her] adequately to perform her job," Pet. App. 15a-16a, diverges from the holdings of other circuits along two related dimensions, *i.e.*, the plaintiff's burden of showing: (1) *when* that accommodation would be successful, *see* Pet. 19-22; and (2) *whether* that accommodation would be successful, *see* Pet. 22-26.

Whereas the Ninth Circuit found below that "a leave of absence was a reasonable accommodation for Humphrey's disability," Pet. App. 21a-22a, without requiring any evidence of a temporal limit on the leave, the Fourth Circuit held in *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995), that, absent a temporal limit, the requested leave is "indefinite" and *per se* unreasonable. *See* Pet. 20-22. Similarly, whereas the Ninth Circuit held that "the ADA does not require an employee to show that a leave of absence is . . . likely to be successful to prove that it is a reasonable accommodation," Pet. App. 15a-16a, the Eleventh Circuit held in *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222 (11th Cir. 1997), that a leave "is not 'reasonable' within the meaning of the ADA" without an adequate showing that the leave is "likely" to enable a successful return to work. *Id.* at 1226; *see* Pet. 22-23.[3] The Ninth Circuit's standard for evaluating whether a

---

number of those courts leads to a confused analysis of such claims. This case affords an appropriate vehicle for clarifying the proper role of the "interactive process" in resolving a reasonable accommodation claim.

[3] In *Hudson v. LCI Telecomms. Corp.*, 87 F.3d 1167 (10th Cir. 1996), likewise, the Tenth Circuit rejected an employee's claim that a leave of absence was a reasonable accommodation because the employee (like respondent here) "had failed to present any evidence of the expected

leave of absence is a reasonable accommodation, in short, is far more lenient than the one applied by other circuits.[4]

Respondent's principal argument against review of that issue is that this case does not involve a "*request* for an indefinite leave of absence." Opp. 11. According to respondent, this case instead concerns whether a leave of absence "should have been, at a minimum, *offered* to [respondent] before she was terminated," and because MHA did not reiterate its offer of a leave before termination, "the issue of the *length* of the leave of absence never arose." *Id.*

That reasoning simply conflates the two independent questions presented in the petition, *viz.*, whether respondent has satisfied her burden in this lawsuit of showing that a leave of absence is a reasonable accommodation, and whether – even assuming that the leave is a reasonable accommodation – MHA can be held liable for failing to reiterate its offer of that accommodation prior to terminating respondent. Indeed, the opinion below treats those questions as entirely separate, making explicit that the question whether MHA was "required to offer Humphrey a leave of absence or other accommodation unless she specifically requested it" is distinct from the question whether she satisfied the "minimal" burden imposed by the court to show that a leave of absence "could plausibly have enabled [her]

---

duration of her impairment" or when she "could expect to resume her regular duties." *Id.* at 1169.

[4] In this case, for example, the only evidence supporting respondent's contention that a leave was a reasonable accommodation was a letter from her doctor that failed to state either (1) that the leave would be definite in duration, or (2) that the leave would likely enable respondent to resume her regular duties. That letter still sufficed to establish a reasonable accommodation under the Ninth Circuit's minimal requirement that a leave need only "plausibly" enable a return to work at some undefined point in the future. *See* Pet. App. 15a. The same evidence clearly would *not* suffice in other circuits. *See* Pet. 20-23.

adequately to perform her job." Pet. App. 15a-16a. After all, even assuming that an employer must reiterate its previously rejected offer of a leave of absence before it can terminate an employee, the employer need not offer a leave of absence at all unless the leave qualifies as a "reasonable" accommodation. The second question presented in the petition concerns the nature of a plaintiff's burden in the latter regard; and the discrepancy between the Ninth Circuit's "minimal" standard and the far stricter standard applied by other courts warrants this Court's review.

Respondent's remaining arguments against review of the second question are entirely without merit. For instance, respondent states that "MHA conceded that granting a leave of absence would not have imposed an undue hardship." Opp. 12. But whether a reasonable accommodation imposes an "undue hardship" is wholly distinct from whether it constitutes a "reasonable" accommodation in the first place. *See* 42 U.S.C. § 12112(b)(5)(A). Respondent also notes that "MHA had a policy and practice of granting leaves of absence ranging from six months to two years," and that "MHA admitted that it would have given Humphrey a leave of absence had she asked for one." *Id.* But the existence of a policy generally allowing leaves of a particular length in no way suggests an intention to accept a leave where there is no limitation on its duration. And in any event, as the Fourth Circuit observed in *Myers*, a "particular accommodation is not necessarily reasonable, and thus federally mandated, simply because the [employer] elects to establish it as a matter of policy." 50 F.3d at 284.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

F. CURT KIRSCHNER
DIPANWITA DEB AMAR
O'MELVENY & MYERS LLP
275 Battery Street
San Francisco, CA 94111
(415) 984-8700

WALTER DELLINGER
(Counsel of Record)
SRI SRINIVASAN*
ERIKA FRICK*
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300
** Admitted in California only*

Attorneys for Petitioner